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No. 87-195

In the Supreme Court of the United States

OCTOBER TERM, 1987

ANNA PENK, et al.,

Petitioners,

v.

OREGON STATE BOARD OF HIGHER EDUCATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
*VIRGINIA L. LINDER
Solicitor General
JEROME LIDZ
PHILIP SCHRADLE
Assistant Attorneys General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Repondent

*Counsel of Record

QUESTIONS PRESENTED

1. Are the district court's findings that defendant did not engage in a pattern and practice of discrimination against women faculty clearly erroneous?

2. Did the courts below correctly allocate the burdens of proof?

3. Did the district court abuse its discretion by excluding two of plaintiffs' witnesses after plaintiffs violated the court's orders to disclose the witnesses' names; and did the court abuse its discretion by limiting the time for rebuttal testimony?

LIST OF PARTIES

Respondent accepts petitioners' statement.

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OPINIONS BELOW

Respondent accepts petitioners' statement.

JURISDICTION

Respondent accepts petitioners' statement.

STATUTES INVOLVED

Respondent accepts petitioners' statement.

STATEMENT OF THE CASE

Respondent rejects petitioners' statement of the case, with the exception of the description of the procedural history, which for the most part is accurate.[1] As discussed below, petitioners' summary of the statistical evidence and their description of the lower courts' opinions are misleading and inaccurate.

The frustrating reality in responding to the petition for certiorari is that this brief cannot possibly set the record straight. Trial of this case generated nearly 25,000 pages of transcript and nearly 25,000 pages of exhibits. The district court's opinion consumes 487 pages, of which more than 120 pages discuss the statistical evidence and the class claim. In such a massive case, it is impossible to summarize succinctly the extensive statistical proofs. It is equally impossible to canvass adequately the other evidence that bears on the class claim. Nevertheless, because the gravamen of petitioners' argument to this Court is that their statistical evidence proved intentional, systematic discrimination as a matter of law, the omissions and misstatements in their summary of that evidence are inexcusable.

Petitioners rely heavily on Exhibit 1, a statistical analysis of a class that differed substantially in size and composition

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[1] Petitioners' last witness testified on May 16, 1984, not May 2, 1984. Contrary to petitioners' assertion (Pet., p. 7), the district court made extensive findings concerning the "extent of the disparity between men and women."

from the class finally defined by the trial court. They cite studies that the district court found had little probative value because of biased variables, poor methodology and failure to model the processes in question. Several of their contentions rest on factual assumptions that the district court expressly rejected.[2] They blithely ignore the bulk of respondent's evidence. Moreover, they fail to acknowledge the nearly wholesale failure of proof in their fifty-eight individual claims, a failure of proof they never seriously disputed on appeal and one that dramatically detracted from any persuasive force of their class proofs. Petitioners have, in short, unfairly cast the evidence in a light most favorable to them, when their obligation is to do precisely the reverse.

The trial judge's 487-page opinion provides the best overview of the evidence, the inferences that it supported, and the inferences that the fact finder permissibly chose to draw. Petitioners have never directly challenged the evidentiary support for so much as one of the trial court's factual findings, and her opinion is therefore the best rebuttal to petitioners' description of this case. Additionally, much of respondent's 148-page brief to the Ninth Circuit was devoted to responding to petitioners' assertions about the proofs, many of which are identical to those that petitioners continue to advance before this Court. Assuming it is necessary to review the evidence for purposes of the Court's consideration of the petition for certiorari, the district court's opinion and the briefs filed in the

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[2] For instance, petitioners assert that their evidence showed "the ultimate control of the Board over the institutions," (Pet., p. 19), while the district court found that "[t]he Board has almost no involvement in work, pay, promotion, and tenure decisions at any institution." (Pet. App. at 11). They state that women "were placed" in fewer tenure track positions, (Pet., p. 16-17), even though the district court expressly found that faculty apply for and are hired into positions which have already been designated as tenure track or fixed term; the tenure status is not assigned after hire. (Pet. App. at 865, 867).

Ninth Circuit can best assist in that review. However, as will be demonstrated below, that review should be unnecessary. At best, petitioners ask the Court to correct perceived errors in applying settled law to disputed facts. Neither their factual description of the case nor the arguments they advance in support of their petition demonstrate a basis for this Court's exercise of certiorari review.

REASONS TO DENY CERTIORARI

I. Introduction.

Petitioners are twenty-two plaintiffs who brought fifty-eight individual discrimination claims on their own behalf and a class action claim on behalf of all women faculty in the Oregon higher education system. In their class claim, petitioners ambitiously assumed the burden of proving a pattern and practice of intentional discrimination at all eight state colleges and universities in the State of Oregon. They attempted to carry their burden of persuasion through the testimony of the named plaintiffs, through more than sixty non-plaintiff "anecdotal" witnesses, and through statistical analyses of salary, rank and tenure. Only three of the named plaintiffs' claims succeeded. All three plaintiffs were from one college, and each prevailed on only one claim. Only one successful claim involved salary. At seven of the eight institutions, petitioners failed to prove even one instance of discrimination. Although the district court's opinion did not specifically address the individual testimony of each of the sixty anecdotal witnesses, the court did consider that evidence collectively. It found, frequently and expressly, that these witnesses' descriptions of alleged discrimination were unconvincing, and thus this evidence did not bolster either the individual or class claims. (Pet. App. at 691, 747, 749-50, 808-09, 813-14, 854-55, 873, 878-79, 890-92).

In reviewing the statistical proofs, the district judge examined the analyses in painstaking detail and simply found peti-

tioners' evidence less persuasive than respondent's. She concluded that a wide variety of factors detracted from petitioners' statistical proofs. These included inherent biases in petitioners' variables which were capable of creating the appearance of discrimination even if none existed (Pet. App. at 699-704); petitioners' use of inaccurate data (*id.* at 731-40); erroneous factual assumptions underlying their statistical models (*id.* at 810); methodological flaws (*id.* at 716-31); failure to account for relevant quality factors (*id.* at 706-13); and the court's doubts about the credibility of petitioners' experts. *Id.* at 686-87. In addition, the district judge reviewed and found probative respondent's statistical analyses, which demonstrated that there was no state-wide or system-wide pattern of statistically significant differences in salaries, rank and tenure after accounting for relevant variables. *Id.* at 838-46 (salary), 795-804 (rank), 867-71 (tenure). Thus, the district judge carefully scrutinized petitioners' statistical evidence. But after evaluating the probative value of that evidence, she declined to draw the inference that the raw disparities generated by petitioners' flawed statistical methodology were the result of systematic, purposeful discrimination.

The Ninth Circuit reviewed the district court's findings under the clearly erroneous standard. Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer*, 470 U.S. 564, 573-75 (1985). It found no error. It also found no legal error in the district court's allocation of the burdens of proof and no abuse of discretion in the trial judge's procedural rulings.

As resolved by the courts below, this case turns on the application of well-settled law, correctly articulated by the lower courts, to an exhaustive and extremely complex factual record. Neither the district court nor the Ninth Circuit had reason to venture into new legal territory, because the grounds for decision were overwhelmingly factual. The class claim and

fifty-five of the fifty-eight individual claims were lost on a straightforward failure of proof.

In their petition for certiorari, petitioners in effect ask this Court to reverse the district court's factual findings and procedural rulings. Those issues do not merit a grant of certiorari. To make those questions appear worthy of this Court's attention, petitioners have substantially misstated both the facts found by the district court and the grounds for decision in both lower courts.

II. This Case Presents No Issue of a Duty to Correct Pre-existing Discrimination.

Petitioners assert that the Ninth Circuit's treatment of their class salary claim departed from this Court's decision in *Bazemore v. Friday*, ___U.S. ___, 106 S.Ct. 3000 (1986). Even if the Ninth Circuit misinterpreted *Bazemore*, which it did not, the misapplication of settled law to this complex factual record would not merit granting certiorari.

Petitioners argue that the Ninth Circuit erred by failing to require respondent to take affirmative steps to correct historical disparity. Their analysis proceeds from a faulty premise. They assume that historical "disparity" is the equivalent of historical "discrimination." In fact, there was no finding of historical discrimination in this case.

The district court expressly and correctly adopted the settled continuing violation rule, reaffirmed by this Court in *Bazemore*, that current discrimination in pay cannot be excused by pointing to time-barred discriminatory decisions as the original source of the discrimination. (Pet. App. at 34).[3] Thus, if the district judge had found historical discrimination that respondent failed to correct, she would have

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[3] Indeed, the district court relied upon *Lamphere v. Brown University*, 685 F.2d 743, 747 (1st Cir. 1982), which petitioners cite as contrary to the Ninth Circuit's position. (Pet. App. at 34).

entered a finding of *present* salary discrimination. She did not make such a finding, however, because she was not satisfied that the historical differences between men's and women's salaries were the product of discrimination. (Pet. App. at 881-95).

Petitioners, nevertheless, contend that the Ninth Circuit, on appeal, held that respondent did not have a duty to correct preexisting discrimination. That is not a fair reading of the court of appeals' opinion. Contrary to petitioners' assertion, the Ninth Circuit did not hold that the failure to correct *discriminatory* disparities in salary is not legally wrong unless based on an improper motive. Rather, it implicitly recognized that purported "disparities" between men's and women's salaries—differences between *average* salaries and differences generated by complex statistical regression analyses using biased variables and poor methodology—did not, standing alone, prove systematic discrimination. *Penk v. Oregon State Bd. of Higher Education*, 816 F.2d 458, 465, 468 (1987). With no finding of systematic discrimination—historical or otherwise—there is no basis for petitioners to argue about the lower courts' application of the legal principles relevant to "continuing violations."

III. The Lower Courts Correctly Allocated the Burdens of Production and Persuasion.

Respondents have difficulty identifying the precise fault that petitioners claim to find in the Ninth Circuit's discussion of the burdens of proof. Their argument appears to rest entirely on the assertion that the Ninth Circuit required too little from defendant in response to plaintiffs' statistical case in chief. Once again, the gravamen of their objection is that the trial judge found respondent's evidence to be more persuasive than theirs and that the Ninth Circuit did not find that conclusion to be clearly erroneous. Petitioners attempt

to convert this into a legal issue by asserting that respondent offered no evidence to explain the salary disparities. Hence, they assert, respondent bore no burden whatsoever. This is plainly false.

One of the ways respondent met its burden of production was to show that there was little in the way of real-life anecdotes of gender-based decision-making to support the inference of discrimination that petitioners asked the court to draw from the sterile statistical numbers. Respondent answered the numerous individual claims with what the trial judge characterized as "a storm of explanation."[4] (Pet. App. at 484-85). The defenses varied with the facts of the particular employment decisions in question, which covered the full range of faculty employment at eight different institutions and dozens of departments with different evaluative criteria. Petitioners provided no rebuttal. In all but three of the fifty-eight claims, the district court found respondent's explanations to be persuasive. The trial court correctly perceived that petitioners' failures of proof in the individual cases undermined their class action assertion that their statistical evidence accurately reflected a "standard operating procedure" of discrimination. *Bazemore*, ___ U.S. ___, 106 S.Ct. at 3008. *See, e.g.*, Pet. App. at 814, 855, 894-95.

Second, respondent criticized petitioners' statistical analyses on a variety of grounds, nearly all of which the district court found probative. For instance, petitioners' three statistical proxies for professional experience—years since receipt of highest degree, years since first hire and age at hire—all measured only *potential* experience and tended to overesti-

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[4] The district court's concluding section lists several: "The Board's explanations for plaintiffs' perceived discriminatory treatment included budget considerations, market competition, quality and quantity of performance, academic qualifications, prior experiences, length of service, and explanations for simple misunderstandings." (Pet. App. at 885).

mate the experience of women faculty as compared to men. This caused petitioners' studies to attribute salary disparities to gender when in fact the disparities resulted from differences in experience. (Pet. App. at 699-704). Petitioners' studies were plagued by other flaws as well. They failed to account for differences in the value that different academic departments attach to various qualifications. (*Id.* at 717-24). Most of the studies used inaccurate data (*id.* at pp. 731-40), and many included faculty who had been excluded from the class. (*Id.* at 787). They omitted rank as a variable, despite its direct influence on salary[5] and despite their inability to establish discrimination in rank (*i.e.*, promotion) decisions. (Pet. App. at 812-14). Numerous other methodological errors and fallacious assumptions biased their studies.[6] Summarizing the impact of respondent's criticisms of petitioners' statistical studies, the trial judge stated:

> The Board has convinced the court that plaintiffs' regression analysis models are flawed. Further, the Board's objections are not merely "unqualified, speculative, [or] theoretical." *Trout* [*v. Lehman*], 702 F2d [1094] at 1102. These flaws in the plaintiffs' models result in larger negative sex coefficients. Hence, the models give the appearance of discriminatory treatment of women even though none may exist.

(Pet. App. at 744-45.) Studies by both parties confirmed the validity of respondent's criticisms: each time either party ran statistical studies that corrected for any of respondent's criticisms, the disparities diminished. (*See, e.g.*, Pet. App. at 721-22, 736-37, 746, 852-53; Ex. 2782, pp. 54, 98 (plaintiffs' exhibit)).

Third, respondent presented its own statistical studies showing that the alleged disparities were due to admitted

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[5] A promotion in rank almost always entails a raise (R.T. 3480, 7457, Ex. 8134 at 68).

[6] *See, e.g.*, Pet. App. at 713-16, 724-31, 774-78, 793-95, 806-11, 834-38, 861-62, 865-67.

differences in the average qualifications, primarily experience, between male and female faculty and to methodological errors in petitioners' studies. The studies showed that when proper variables and methodology were used, there was no pattern of disparities in statistically significant ranges. *See, e.g.*, Pet. App. at 795-806 (rank); 838-46 (salary); 867-71 (tenure); Ex. 8186. Thus, petitioners' assertion that respondent produced no "explanation" for the disparities is false. Respondent's proofs not only demonstrated that the disparities in petitioners' studies were illusory but also established affirmatively the absence of a pattern of statistically significant disparities in pay, promotion and tenure decisions at the eight state colleges and universities.

In their petition, petitioners miscast entirely the thrust of respondent's criticisms of the statistical proofs. Contrary to their assertion, respondent did not argue, and the trial court did not find, that the statistical disparities between the men's and women's salaries were due to differences in the quality of performance.[7] Although respondent argued, and the lower courts agreed, that the absence of quality and performance measures in petitioners' statistical analyses rendered them less probative, that was only one of many criticisms of petitioners' statistical studies. Apart from the absence of proxies for quality of performance, the biases in petitioners' proxies for objective qualifications and the methodological errors in their statistical studies had the demonstrated effect of creating an appearance of adverse treatment of women even in a wholly nondiscriminatory environment. (Pet. App. at 747-48).

Petitioners appear to argue that, as a matter of law, they must prevail unless respondent conducted studies which

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[7] Indeed, both parties' studies of salary increases during the relevant time period, the most obvious measure of qualitative evaluations, found no differences between the raises given male and female faculty. (Ex. 8186 at 32-34, Tables 47-58; Ex. 2782 at 9).

affirmatively showed *no* disparity. (Pet. at pp. 33-34, 38, 42). Petitioners' contention is not a correct statement of the well-settled law in this area. Plaintiffs in a Title VII case unquestionably bear the burden of persuasion throughout the case. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). A defendant may defeat a prima facie showing of a discriminatory pattern or practice by showing that the proof is inaccurate or incomplete. *Teamsters v. United States*, 431 U.S. 324, 360 (1977). Moreover, common sense as well as sound legal principles dictate that statistical evidence cannot carry a plaintiff's burden unless the trier of fact, applying correct legal standards, believes that the statistics describe the employment decisions at issue with a reasonable degree of accuracy. *Teamsters*, 421 U.S. at 340 (statistics' "usefulness depends on all of the surrounding facts and circumstances"). Here, where petitioners' evidence failed to achieve that degree of accuracy, the court was entitled to find that they had not carried their burden of persuasion.

Finally, petitioners take issue with the Ninth Circuit's omission of a defendant's burden of production in its description of the relevant burdens. (Pet. at p. 34). In context, the Ninth Circuit's statement is completely accurate. Where, as here, both parties have fully litigated the asserted claims, and the trial court reaches the ultimate question of whether plaintiffs have proven their claims of discrimination, then considerations about whether the parties met their intermediate burdens of production fall from the case. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983).[8] Furthermore, even if petitioners were correct, it would

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[8] Lower courts have been quick to follow this Court's lead and to recognize that, once all of the proofs are in and the case is submitted on its merits, it serves no useful purpose to try to dissect the evidence retrospectively and analyze it in terms of burdens of production rather than burdens of persuasion. Moreover, the utility of the *McDonnell Douglas-Burdine* model to

(Footnote continued on next page)

not advance their cause, because respondent fully met the burden they advocate. To hold that any assumed defect in an appellate court's articulation of the burdens is a fatal error where the record overwhelmingly shows that respondent satisfied its burden of production would be a towering triumph of form over substance. The Ninth Circuit committed no legal error relating to the parties' burdens, and petitioners' erroneous contention to the contrary does not warrant granting certiorari.

IV. Neither the Ninth Circuit Nor the District Court Held that Statistical Analyses of Less Than All Measurable Variables Could Not Prove Plaintiffs' Case.

Petitioners argued to the Ninth Circuit that the district court "required too much of their statistical proof," 816 F.2d at 465. The Ninth Circuit responded:

> We note that by finding fault and infirmities in the statistical evidence presented, the district judge was neither evading her responsibility to examine the evidence, nor placing impossible burdens on the plaintiffs. The judge was simply unpersuaded. . . .

Id. (footnote omitted). To this Court, petitioners argue that the Ninth Circuit erred by not recognizing that statistical analyses that omit some measurable variables might be probative of discrimination. (Pet. at 39-45).

This is a non-issue, created only by petitioners' mischaracterizations of the lower court's holdings. The trial

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analyze the evidence in a complex class action is questionable. As colorfully observed by Judge Higginbotham, "[i]n a complex class action, utilizing statistical proof and counterproof, the value of the *Burdine* sequence—to highlight the issues in contest—is about as relevant as a minuet is to a thermonuclear battle." *Vuyanich v. Republic National Bank*, 521 F.Supp. 656, 661 (N.D. Tex. 1981), *vacated and remanded*, 723 F.2d 1195 (5th Cir. 1984), quoted with approval *Craik v. Minnesota State University Bd.*, 731 F.2d 465, 470 n. 7 (8th Cir. 1984).

judge did not rule that petitioners' statistics were unacceptable evidence of discrimination. (*E.g.*, Pet. App. at 713 ("The absence of any control for quality in plaintiffs' statistics is not of itself fatal, but is an obvious weakness . . ."); *id.* at 749 ("the flaws do not render plaintiffs' statistics wholly meaningless.")). Rather, after a painstaking and thorough review of respondent's criticisms of the statistics and the other evidence in the case, she found that the many flaws in petitioners' analyses created "the appearance of discriminatory treatment of women even though none may exist." (*Id.* at 745). Therefore, she concluded that petitioners' statistics were less probative than they might otherwise have been and less persuasive than respondent's analyses. The court's approach was, thus, wholly consistent with *Bazemore*'s admonitions that "failure to include variables will affect the analysis' probativeness, not its admissibility," ___ U.S. at ___, 106 S.Ct. at 3009 (footnote omitted), and that "[w]hether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant." *Id.*

The Ninth Circuit, in turn, recognized that petitioners' statistical proofs were admissible on the question of discrimination and that whether they were persuasive, given their flaws, was for the trial judge to gauge. 816 F.2d at 465. ("The district judge admitted statistical multiple regression evidence at trial and then chose to discount the weight of that evidence during her deliberations following trial.") The Ninth Circuit, thus, followed *Bazemore*'s holding with care, recognizing that flaws in statistical evidence generally go to weight, not admissibility, just as the district judge had concluded in her opinion.

V. The Lower Courts Did Not Deny Petitioners the Opportunity to Prove Pretext.

Petitioners assert that they had insufficient opportunity to prove that respondent's defenses were pretextual, because the district court excluded two expert witnesses and limited their time to present rebuttal evidence. The Ninth Circuit properly reviewed each of these actions for abuse of discretion. *See National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976) (dismissal of complaint for violation of discovery orders); Fed. R. Evid. 611(a) (mode and order of presenting evidence). Both parties briefed these issues extensively at trial and on appeal; the Ninth Circuit found no abuse of discretion. Neither issue presents a question of significance meriting this Court's extraordinary exercise of certiorari review. *See* Sup. Ct. R. 17. Nor do the facts of this case present any substantial doubt that the lower courts' rulings were correct.

The trial court's decision to exclude the two expert witnesses followed the court's special grant of a ten-day extension of the deadline to disclose experts' names, which petitioners failed to meet. Viewed in context, the sanction was reasonable. It was imposed only after it became clear that petitioners' counsel had withheld the experts' names for a considerable time after deciding to call them as witnesses, with the effect of depriving respondent of an adequate opportunity to prepare for cross-examination in a case where cross-examination of experts was both preparation-intensive and crucial. (*See* Motions and Orders at C.R. 643, 649, 651, 652, 668).

Petitioners' arguments concerning the court's restraints on rebuttal time omit two key facts. First, the trial judge expressly directed petitioners to introduce all their anecdotal rebuttal testimony by affidavit or deposition, subject to cross-

examination (C.R. 651, p.3), as she had required respondent to do for substantial portions of its case in chief.[9] (C.R. 603, p. 2). Petitioners introduced *no* affidavits or depositions to rebut respondent's explanations of the reasons for individual employment decisions challenged by plaintiffs and the anecdotal witnesses. Second, petitioners failed to exhaust all the time allotted for rebuttal. (*See* R.T. 22666).

As to both the exclusion of the witnesses and the limitations on rebuttal time, petitioners failed to preserve the issues with adequate offers of proof. Aside from bare assertions that the two experts are internationally famous and would have rebutted respondent's experts' testimony, petitioners have not argued that the *substance* of the expert testimony would have affected the outcome of the case. The trial court's order noted that petitioners could make the same points with other expert witnesses, and that the witnesses' reputations, as opposed to their testimony, would have little effect on the court's decision. (C.R. 668, p. 3). As to petitioners' rebuttal case, there simply is nothing in the record to suggest they had more rebuttal proofs to present.

VI. The Lower Courts Did Not Apply a More Lenient Title VII Standard to Academic Employers Than to other Employers.

Pay, promotion and tenure decisions in academic institutions necessarily entail subjective evaluations of such factors as the quality of teaching, scholarship and service, often in esoteric fields of study. Where, as here, the evaluative criteria and the weights ascribed to them vary from institution to institution and even among departments within a single institution, developing a valid statistical model to describe such decisions admittedly is a complex task, but not an impos-

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[9]The trial judge also limited respondent's time for presenting its case in chief and for rebutting petitioners' statistical studies on the revised class. (C.R. 603, p. 3; C.R. 638; C.R. 651, pp. 2-3).

sible one. The fact that petitioners assumed the difficult burden of proving intentional discrimination throughout a diverse, decentralized state-wide system of higher education and were unable to sustain their burden of persuasion does not justify an inference that the lower courts applied a different standard to academic employers.

This case simply does not present an issue of "deference" to subjective assessments in academia of the quality of teaching performance. All of the cases petitioners quote, and most of the cases they cite, involved individual claims of discrimination rather than complex class actions. The question of "academic deference" that petitioners assert troubles and confuses those courts is one that arises, if at all, when courts must test university administrators' explanations for specific employment decisions in individual cases (*e.g.*, that a professor is a poor researcher).[10] Petitioners confuse that issue with the question of what weight a trier of fact may or must give to complex statistical analyses, a question that does not involve issues of "academic deference" as discussed in the cases upon which petitioners rely.

In this case, the lower courts correctly recognized that the probative value of statistical analyses depends in part on the degree to which they model accurately the decision-making processes they purport to study. (Pet. App. at 689-97, 712-13, 769-70, 810-12); 816 F.2d at 464. *See generally Bazemore*, ___ U.S. ___, 106 S.Ct. at 3009; Stacy and Holland, *Legal and Statistical Problems in Litigating Sex Discrimination Claims in Higher Education*, 11 J. COLL. & U.L. 107, 147 (1984). As they conceded in their "rebuttal report," petitioners *intentionally* failed to model the processes under study, contending that

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[10] The trial judge's detailed examination of the twenty-two individual plaintiffs' claims, consuming 339 pages in her opinion, belies any contention that she treated the individual claims with an excessively deferential, hands-off approach.

subjective evaluation of faculty was illegitimate. (*See* Pet. App. at 708-09). That position cannot be sustained. Title VII prohibits discrimination; it does not authorize a court to substitute its judgment as to appropriate evaluative criteria, at least in the absence of proven discrimination.

At best, this case presents the question whether, as a matter of law, a trier of fact is obligated to infer discriminatory motive from statistics that were flawed in numerous respects and from anecdotal proofs that overwhelmingly failed to provide supporting real-life accounts of discriminatory treatment. That is not a question that troubles or confuses lower courts, nor is it a question that has never been addressed or resolved by this Court. *E.g.*, *Bazemore*, *supra*.

Petitioners' class claim did not fail because the courts deferred to academic judgment. It failed because petitioners' statistical analyses were flawed in numerous respects, because their nonstatistical proofs further undermined their class claims, and because respondent presented more persuasive evidence. Petitioners understandably seek to infer a legal error from their failure to convince the lower courts, but the inference is unwarranted. Petitioners chose to pursue sweeping allegations of system-wide discrimination; they simply failed to prove their claims.

VII. Summary.

Despite petitioners' efforts to make it appear otherwise, this case simply does not present the kind of special and important legal questions that merit this Court's review. Although the facts are extraordinarily complex and although both parties could argue at length about what the evidence can and (for the trier of fact) did show, that dispute hardly warrants appellate review at the national level. The Ninth Circuit's opinion does not conflict with decisions of other circuits; it does not announce new law; it does not present an opportunity for this Court to clarify an important area

of law that is confused or in disarray. Petitioners' assertions are non-issues. But even if they were not, they would be at most case-specific claims of error. The petition presents no issue of importance beyond the resolution of this case and it thus presents no basis upon which this Court should exercise certiorari review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,
DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
VIRGINIA L. LINDER
Solicitor General
JEROME LIDZ
PHILIP SCHRADLE
Assistant Attorneys General
Counsel for Respondent